Upper Tribunal
(Immigration and Asylum Chamber)

Singh (EEA; EFMs) [2021] UKUT 00319 (IAC)

THE IMMIGRATION ACTS

Heard at Field House via Teams	**Decision & Reasons Promulgated**
	On 13 July 2021

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Before

UPPER TRIBUNAL JUDGE RINTOUL

UPPER TRIBUNAL JUDGE RIMINGTON

Between

DAMANDEEP SINGH

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

1. The duty to facilitate entry arises when the partner with whom the Union citizen **has** a durable relationship duly attested. That is a continuing requirement in order for someone to be a beneficiary; there has to be an extant nexus with the EEA national.

2. Accordingly, a non-EEA national, whose durable relationship has ended, no longer comes within the ambit of article 3 (2) of the Directive from that point and so there can at that point be no duty on a member state to facilitate that individual's entry to or residence in that state.

3. Even if Article 3 (2)(b) of the Directive were not clear and precise, it cannot be argued that the Directive can be read such that article 13 should apply to those in durable partnerships.

4. There is nothing in the Directive, or the case law of the CJEU to suggest that the differential treatment of married and unmarried partners within the Directive is impermissible. The right under EU law is for applications to be facilitated; that is the limit of the right, subject to it being effective in the sense of in accordance with the principles of EU law. Not permitting those who are no longer beneficiaries (as defined) to remain does not make that right ineffective, given that the underlying law, as noted above, requires a continuing nexus with the EU national to exist.

Representation :

For the Appellant: Mr G Davison instructed by Brit Solicitors

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1.
The appellant , who is a citizen of India, appeals with permission against the decision of First-tier Tribunal Judge O'Malley , promulgated on 2 6 February 2020 dismissing his appeal under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") against the decision of the respondent made on 28 June 2019 to refuse his application for a residence card as confirmation of his retained right of residence . That decision was set aside for the reasons set out in the decision of Upper Tribunal Judge Rimington dated 12 August 2020, a copy of which is annexed to this decision.

Background

2.
The app ellant had on 30 January 2015 been issued with a residence card confirming his right of residence as the extended family member of an EEA national with whom he was in a durable relationship. That relationship broke down owing to domestic violence on 5 August 2017 and on 24 April 2019, he applied for a residence card as confirmation of his right of residence as a person who had retained the right of residence pursuant to reg.10 of the EEA Regulations ; or, in the alternative, that differential treatment of the appellant on the basis of his marital status, was discriminatory and thus unlawful as it offended against the principle of equal treatment.

3.
The respondent refused that application on the basis that , as he had not been married to his former partner, he could not meet the requirements of reg. 10 .

The Law

4.
It is perhaps best to start with a consideration of the legal effect of withdrawal from the European Union given that we have been asked to consider an EU Directive, and the Charter of Fundamental Rights and Freedoms.

5.
Section 1 of the European Union (Withdrawal) Act 2018 ("EUWA") repealed the European Communities Act 1972 ("ECA") on "exit day" that, is, 31 January 2020 but following the Withdrawal Agreement in October 2019, section 1A EUWA 2018, inserted by the European Union (Withdrawal Agreement) Act 2020, provided that the ECA continued to have effect during the implementation period up to 31/12/20, subject to certain modifications

6.
The EUWA in simple terms retains EU law, as it was as at 31 December 2020, and makes it part of domestic law. That is, however, subject to exceptions. For the purposes of this appeal it is sufficient to focus on how the EEA Regulations and the Charter of Fundamental Rights and Freedoms have been affected.

7.
By operation of section 5 (4) of EUWA the Charter of Fundamental Rights is not part of domestic law on or after 31 December 2020, but fundamental rights or principles which exist irrespective of the

Charter are, however, retained by section 5(5), but only if they were recognised as general principles of EU law by the CJEU in a case decided before that date (whether or not as an essential part of the decision in the case) (see Schedule 1, para. 2 of EUWA)

8.
The EEA Regulations were revoked in their entirety at 11pm on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020. They are, however, preserved for the purposes of this appeal by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309), ("the EEA Transitional Regulations").

9.
Paragraph 5 of Schedule 3 to the EEA Transitional Regulations makes provision for the appeal rights and appeals pending as at the date of revocation of the EEA Regulations as follows:

5.— Existing appeal rights and appeals

(1) Subject to sub-paragraph (4), the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply—

(a) to any appeal which has been brought under the Immigration (European Economic Area) Regulations 2006 and has not been finally determined before commencement day,

(b) to any appeal which has been brought under the EEA Regulations 2016 and has not been finally determined before commencement day,

(c) in respect of an EEA decision, within the meaning of the EEA Regulations 2016 , taken before commencement day, or

(d) in respect of an EEA decision, within the meaning of the EEA Regulations 2016 as they continue in effect by virtue of these Regulations or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 , which is taken on or after commencement day.

(2) For the purposes of paragraph (1)—

(a) an appeal is not to be treated as finally determined while a further appeal may be brought and, if such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned; and

(b) an appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom.

(3) The revocation of the EEA Regulations 2016 does not affect the application of the Immigration (European Economic Area) Regulations 2006 to an appeal that falls within paragraph 3(1) of Schedule 4 to the EEA Regulations 2016 .

(4) The provisions specified in paragraph 6 do not apply to the extent that the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply to an appeal or EEA decision by virtue of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 .

10.
Reg 2 of the EEA Transitional Regulations provides:

"commencement day" means the time at and date on which the Immigration (European Economic Area) Regulations 2016 are revoked for all purposes”

That is, 11pm on 31 December 2020 – see paragraph 8 above.

11.
As this appeal was lodged on 11 July 2019, and concerns a decision made on 28 June 2019, it falls within paragraph 5 (1)(b) of Schedule 3 of the EEA Transitional Regulations . On that basis there is a right of appeal.

12.
Paragraph 6 of Schedule 3 to the EEA Transitional Regulations sets out those provisions which are preserved and also any amendments made. Those relevant here are as follows:

(1) The specified provisions of the EEA Regulations 2016 are

(a) regulation 2 (general interpretation) with the following modifications—

(i) as if all instances of the words "or any other right conferred by the EU Treaties"—

(aa) in so far as they relate to things done on or after exit day but before commencement day, were a reference to a right conferred by the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;

(bb) in so far as they relate to things done on or after commencement day, were omitted;

(ii) as if all instances of the words "or the EU Treaties"—

(aa) in so far as they relate to things done on or after exit day but before commencement day, were a reference to the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;

(bb) in so far as they relate to things done on or after commencement day, were omitted;

…

(cc) Schedule 2 (appeals to the First-tier Tribunal) with the modification that—

(aa) in relation to an appeal within paragraph 5(1)(a) to (c), in each of paragraphs 1 and 2(4), the words "under the EU Treaties", in so far as they relate to things done on or after exit day but before commencement day, were a reference to the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;

13.
“EU Treaties” is defined in paragraph 1 of Schedule 1 to the Interpretation Act 1978 [1] . to include the Treaty on the Formation of the European Union as was in force on 31 December 2020

14.
Part 4 of the EU Withdrawal Agreement maintains in effect the law of the European Union which is, in addition, defined to include the EU Treaties subject to certain exceptions which are not applicable here.

15.

The effect of this is that the provisions of the TFEU, including the legislation enacted thereunder, which includes the Directive 2004/38 (“the Directive”), are preserved by the Withdrawal Agreement and thus are applicable. It is also clear from the wording of the Directive although it refers to the Treaty on the European Economic Area that that is made under the TFEU, which was renamed as that by the Treaty of Lisbon.

16.
The first issue for consideration is what now is the ground of appeal? Prior to the revocation of the EEA Regulations that was set out in Schedule 2 of the Regulations which provided as follows:

1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal)—

section 84 (grounds of appeal)1, as though the sole permitted grounds of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom (“an EU ground of appeal”)

17.
The effect of the amendments as set out above is that the sole ground of appeal is, in effect, whether the decision under appeal breaches the appellant’s rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2021.

18.
The recitals to the Directive provide:

(6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

(15) Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation.

19.
Article 3 (2) of the Directive provides as follows:

Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

…

(b) the partner with whom the Union citizen has a durable relationship, duly attested

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

20.
Article 13 of the Directive provides, materially:

Article 13

Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

…

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

(a) prior to initiation of the divorce or annulment proceedings or termination of the registered pa rtnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or

(b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

…

21.
The EEA Regulations provided:

10.— “Family member who has retained the right of residence”

(1) In these Regulations, “family member who has retained the right of residence” means , subject to paragraphs (8) and (9), a person who satisfies a condition in paragraph (2), (3), (4) or (5).

…

(5) The condition in this paragraph is that the person (“A”)—

(a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the [initiation of proceedings for the termination] [1] of the marriage or civil partnership of A;

(b) was residing in the United Kingdom in accordance with these Regulations at the date of the [initiation of proceedings for the termination] [1] ;

(c) satisfies the condition in paragraph (6); and

(d) either—

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership, the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii) the former spouse or civil partner of the qualified person or the EEA national with a right of permanent residence has custody of a child of that qualified person or EEA national;

(iii) the former spouse or civil partner of the qualified person or the EEA national with a right of permanent residence has the right of access to a child of that qualified person or EEA national, where the child is under the age of 18 and where a court has ordered that such access must take place in the United Kingdom; or

(iv) the continued right of residence in the United Kingdom of A is warranted by particularly difficult circumstances, such as where A or another family member has been a victim of domestic violence whilst the marriage or civil partnership was subsisting.

22.
It is the settle d case law of the ECJ that where the wording of an EU law provision is clear and precise, its contextual or purposive interpretation may not call into question the literal meaning of that provision, as this would run counter to the principle of legal certainty. See Commission v United Kingdom [2010] EUECJ C-582/08 at [49] to [51] :

49 According to settled case-law, the principle of legal certainly requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (see Case C-345/06 Heinrich [2009] ECR I'1659, paragraph 44 and the case-law cited).

50 It is true that that case-law refers to the relationship between individuals and public authorities. However, as the Advocate General observed in point 64 of his Opinion, that case-law is also relevant in the context of the transposition of a directive in the area of taxation.

51 The Court cannot, in the face of the clear and precise wording of a provision such as Article 2(1) of the Thirteenth Directive, interpret that provision with the intention of correcting it and thereby extending the obligations of the Member States relating to it (see, by analogy, Case C-48/07 Les Vergers du Vieux Tauves [2008] ECR I-10627, paragraph 44).

23.
Put simply , when interpreting European law, a court cannot ignore the clear and precise wording of an EU law provision.

24.
In R (on the application of BJ & Ors) v Secretary of State for the Home Department (Article 9, Dublin III; interpretation) [2019] UKUT 66 (IAC) ; [2019] Imm AR 663 the Upper Tribunal held at [38]:

38. It follows that the approach to interpreting a provision of EU law requires a systematic approach , looking at the words in the context of the structure of EU law as a whole and asking:

(i) Is the meaning of the provision defined in EU Law?

(ii) If not, can the words be given their usual, ordinary meaning?

(iii) If not, what are the possible different interpretations?

(iv) What is the objective of the provision?

(v) Which interpretation best preserves its effectiveness?

(vi) Which interpretation best achieves the objective?

(vii) What are the consequences of the different interpretations?

Submissions

25.
Mr Davison submitted, relying on his skeleton, that on proper construction of article 13 of the Directive, the appellant is entitled to a right of residence as he is the victim of domestic violence. In the alternative, he submitted that the failure to do so either under the EEA Regulations or otherwise was unlawful discrimination.

26.
The respondent's case, set out primarily in written submissions from Mr Peter Deller, is that the duty to facilitate residence under article 3 (2) ha d ceased well before the date of decision as that duty exist s only so long as the durable relationship exists. In support of that proposition , he relied on an unreported decision of the Upper Tribunal, Tarikul Islam v SSHD [2020] UKAITUR EA/04390/2019 . It was further submitted that the Directive could not be construed in the way contended by the appellant; and, in any event, there had been no discrimination.

27.
We are satisfied that it would, in the particular circumstances, be appropriate to have regard to Tarikul Islam as it addresses a point which is not addressed in any reported decisions of the Upper Tribunal .

Discussion

28.
A rticle 3(2) of the Directive is clear . The duty to facil itate entry arises when the partner with whom the Union citizen has a durable relationship duly attested. T hat is a continuing requirement ; in order for someone to be a beneficiary there has to be an extant nexus with the EEA national . Equally, were the same logic to apply to other provisions, such as article 3 (2)(a) , this would be contrary to what the ECJ held in Rahman [2012] EUECJ C -83/11 ; [2013] Imm AR 73 at [27] to [35] where dependence in the country from which the family member comes is necessary .

29.

Accordingly, a nd consistent with Chowdhury v SSHD [2021] EWCA Civ and Oboh v S SHD [201 3] EWCA Civ 1525 ; [2014] Imm AR 521 , a non-EEA national, whose durable relationship has ended, no longer comes within the ambit of article 3 (2) of the Directive from that point and so there can at that point be no duty on a member state to facilitate that individual's entry to or residence in that state .

30.
We recall that here, as was recorded in the First-tier Tribunal's decision at [4], the appellant had confirmed the relationship had ended on 5 August 2017, 20 months before he applied for a residence card. In our view, that strengthens the respondent's argument that there is no longer a duty to facilitate entry.

31.
Further, and in the alternative, even were article 3 (2)(b) of the Directive not clear and precise, the recitals in the Directive do not assist the appellant. It cannot be argued that the Directive can be read such that article 13 should apply to those in durable partnerships for the reasons we now set out .

32.
The Directive draws a distinction between family members as defined in article 2 and beneficiaries identified in article 3. This distinction between rights accruing to workers and their spouses/children on the one hand, and other members of the family whose entry is to be facilitated, is a distinction which dates back as far as Regulation 15/1961, the first European legislation on the issue.

33.
Recital 6 starts " I n order to maintain the unity of the family" yet what occurred here is that the family ha d on any realistic view ceased to exist. The durable relationship has ceased well before the application made.

34.
R ecital 6 and recital 15 clearly maintain a distinction between "family members" and others. Recital 15 proceeds on the basis of that distinction. It would have been open to the European Union when enacting the Directive to have included within that recital the position of individuals in durable relationships or whose entry and residence had been facilitated, but it did not. As Rahman [2012] EUECJ C-83/11 and subsequent cases make clear, those whose entry is facilitated do not acquire rights under the Directive. Further, in recital 15, t here is a closed list of those whose rights are to be preserved, which does not include the breakdown of a durable relationship.

35.
What Mr Davison submits is that the Directive must be read as though Article 13 applies to those who are (o r have been) beneficiaries within article 3 (2). We disagree.

36.
We find no proper basis on which, applying the principles of interpretation set out above, the Directive can be read as though there was no distinction to be made in Article 13 between those who are married and those who are not. That would do violence to the structure of the Directive which clearly maintains the distinction between people who are married and those who are not.

37.
Article 13.2 of the Directive proceeds on the basis that (a) rights of residence as a family member, flowing from a marriage or civil partnership, have come into being under the Directive; and (b) that these would otherwise have ceased as a result of the termination of the legal relationship with the

EEA national being dissolved. The ambit is thus clearly defined; had the EU wished to extend the provision to those who were in (or had been) durable relationships, then they would have done so. They did not. Further, were article 13.2 to be read so as to extend to those, then the inclusion of civil partnerships as duly registered would in effect be redundant, it being difficult to see how those would not also fall within the definition of durable relationship. It would also bring the rights that accrue to beneficiaries of this sort into the ambit of EU law rather than them remaining in domestic law. As Beatson LJ observed in Oboh at [4 9]:

…. While falling considerably short of the automatic rights of entry and residence conferred on family members, these rights are far from negligible and confer a privileged status over other applicants for rights of entry and residence. It does not seem to us, however, that the substantive content of the privileges conferred on other family members who qualify under Article 3 gives any indication as to the intended scope of application of the provision. There is no apparent link between the precise limits of the category of qualifying persons and the content of the privileges. Such privileges could, as a matter of policy, have been conferred on a wider or a narrower category of persons than that defined in Article 3(2).

38.
It is simply not possible to derive any conclusion that Article 13 must be interpreted in the way contended. The European Union has clearly decided that certain family relationships will be protected, and others will not.

39.
The reality is that the appellant ceased to be a family member by operation of the Regulations when his relationship ceased. We find that, on a proper construction of the Directive, he ceased to fall within the terms of Article 3.2(b) as he was no longer in a durable relationship. Accordingly, at that point, he ceased to benefit from the Directive. That was well before the date of decision, and it simply cannot be argued that there is any basis on which there was a duty to facilitate his continued residence.

40.
We turn next to the issue of discrimination. In doing so, we remind ourselves that the Charter of Fundamental Rights and Freedoms is not part of domestic law , subject to the savings identified above at [7] although we do note that recital 31 of the Directive may also be relevant.

41.
It is necessary first to consider what act is said to be discriminatory, bearing in mind that the Directive clearly makes a distinction on the rights granted to non- EEA nationals based on their marital status. That is , we find, deliberate and consistent with recital (31) which , while lis ting many bases on which discrimination is not permitted, omits any reference to marital status.

42.
We recall at this point the scope of the right of appeal. We find nothing in the Directive, or indeed the case law of the CJEU to suggest that the differential treatment of married and unmarried partners within the Directive is impermissible, and we recall also that the right under EU law is for applications to be facilitated. That is the limit of the right, subject to it being effective in the sense of in accordance with the principles of EU law. We find no basis for any submission that not permitting those (as is the case with this appellant) who are no longer beneficiaries (as defined) to remain, makes that right ineffective , given that the underlying law, as noted above, requires a continuing nexus with the EU national to exist.

43.
We accept that unmarried partners of EU British Citizens will, so long as they meet the requirements of Appendix FM DVILR of the Immigration Rules , be afforded protection if the relationship comes to an end as a result of domestic violence

44.
The respondent submits that there is in fact no discrimination in this case because there is nothing to prevent a victim of domestic violence from applying f or leave. Although that is so, it is an argument that misses the point. As is accepted by the respondent, the appellant could not meet the requirements of the Immigration R ules not least because he had not been granted leave under the rules. He could only succeed by demonstrating that his removal would be in breach of article 8 of the Human Rights Convention. His position is therefore substantially different from a person granted leave to remain under the Immigration Rules as a partner who is not required to demonstrate that removal would be a breach of article 8 . Further, the respondent's policy is that a refusal of leave under Appendi x FM DVILR is not a human rights decision. I t cannot properly be argued that there would be reverse discrimination: under Appendix FM DVILR of the Immigration Rules the victim would be granted indefinite leave to remain .

45.
It is our understanding that, in any event, the appellant has applied under the EU Settlement Scheme for leave to remain. We did not hear argument on his eligibility under that scheme and so cannot pass comment on th at application

46.
Contrary to Mr Davison's submissions, w e do not accept that Netherlands v Reed [1986] EUECJ R-59/85 is relevant on the facts of this case. T hat was a refusal of a member state to give the same advantage to EU nati onals as given to its own nationals, in this case, a refusal to admit the unmarried partners of EU nationals which was characterised as an inhibition on the right of free movement of workers who, unlike their Netherlands counterparts, could not be joined by unmarried partners. It is, however, very difficult indeed to characterise the fact that an EU national 's former partner whom she had subjected to violence, not being able to remain in the host member state as in any way inhibiti ng the EU nationals' right to free movement . Quite how that could be a "social advantage" is unclear.

47.
Moreover, w e consider that, on the facts of this appeal, th e appellant 's circumstances place him outwith the provisions of the TFEU, the Directive and the EEA Regulations , and therefore he cannot derive assistance from the prohibitions against discrimination thereunder.

48.
Drawing these strands together, we consider that the appellant has not demonstrated that the decision made was in breach of his rights under the EU Treaties.

49.
Accordingly, for these reasons, we dismiss the appeal .

Notice of Decision

1.
We dismiss the appeal .

Signed Date 30 November 2021

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul

ANNEX - ERROR OF LAW

IAC-AH- SAR -V1

Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: [-]

THE IMMIGRATION ACTS

Heard at Field House via Skype **On 6 th August 2020**	**Decision & Reasons Promulgated** .....

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR DAMANDEEP SINGH

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr G Davison instructed by Pasha Law Chambers Solicitors

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The applicant appeals against the decision of First-tier Tribunal Judge O'Malley of 26 th February 2020 dismissing an appeal against the respondent's decision of 28 th June 2019 refusing to grant a retained right of residence.

2. The appellant, an Indian national, was granted a residence card on 30 th January 2015 as the extended family member of an EEA national because the couple evidenced they were in a durable

relationship. They were not married nor in a civil partnership. On 24 th April 2019 the appellant made an application for a retained right of residence. The relationship had ended apparently as a result of domestic violence. That application was refused.

3. The respondent's refusal decision considered the application under Regulation 15 with reference to Regulations 8 and 10 of the Immigration (European Economic Area) Regulations 2016. It was accepted that he had been in a relationship with Pauline Elizabeth Boother, an Irish national, and he was issued with a residence card on 30 th January 2015 and that he was seeking a retained right of residence following the breakdown of his relationship to that EEA national. The letter of refusal, however, stated that:

"To meet the conditions of Regulation 10(5)(d)(i) you must have:

• either been married or in a civil partnership with an Economic Area EEA national for at least three years immediately before beginning proceedings for divorce, annulment or dissolution;

• lived in the UK with the EEA national sponsor for at least one year during the time of their marriage or civil partnership".

4. Specifically, it was stated that

" as the former unmarried partner of an EEA national you cannot currently qualify under Regulation 10 of the Immigration (European Economic Area) Regulations 2016 and this application falls for refusal".

5. In the light of the recent decision of the Court of the Justice of the European Union (**Banger (Case C-89/17)**) the Secretary of State did not argue that Regulation 36(4) of the present Regulations operated to prevent a right of appeal being exercised in his case.

Grounds of appeal against the First-tier Tribunal decision

6. The grounds advanced that:

(i) the First-tier Tribunal failed to assess Regulations 8 and 10 in a purposive manner;

(ii) if the purposive reading should not be undertaken the judge had failed to address the discriminatory outcome of the legislation.

7. It was submitted to the First-tier Tribunal that in applying the EEA Regulations there must be no discrimination, everyone must be treated fairly.

8. The First-tier Tribunal Judge at paragraph 17 accepted that the appellant was a victim of domestic violence as claimed.

9. Regulation 10 of the EEA Regulations 2016 sets out the following:

" **Family member who has retained the right of residence**

10. (1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraphs (8) and (9), a person who satisfies a condition in paragraph (2), (3), (4) or (5).

(2) The condition in this paragraph is that the person –

(a) was a family member of a qualified person or of an EEA national with a right of permanent residence when the qualified person or the EEA national with the right of permanent residence died;

(b) resided in the United Kingdom in accordance with these Regulations for at least the year immediately before the death of the qualified person or the EEA national with a right of permanent residence; and

(c) satisfies the condition in paragraph (6).

(3) The condition in this paragraph is that the person –

(a) is the direct descendant of –

(i) a qualified person or an EEA national with a right of permanent residence who has died;

(ii) a person who ceased to be a qualified person on ceasing to reside in the United Kingdom;

(iii) the spouse or civil partner of the qualified person or EEA national described in sub-paragraph (i) immediately preceding that qualified person or EEA national's death; or

(iv) the spouse or civil partner of the person described in sub-paragraph (ii); and

(b) was attending an educational course in the United Kingdom immediately before the qualified person or the EEA national with a right of permanent residence died, or ceased to be a qualified person, and continues to attend such a course.

(4) The condition in this paragraph is that the person is the parent with actual custody of a child who satisfies the condition in paragraph (3).

(5) The condition in this paragraph is that the person ("A") –

(a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A;

(b) was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) satisfies the condition in paragraph (6); and

(d) either –

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership, the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii) the former spouse or civil partner of the qualified person or the EEA national with a right of permanent residence has custody of a child of that qualified person or EEA national;

(iii) the former spouse or civil partner of the qualified person or the EEA national with a right of permanent residence has the right of access to a child of that qualified person or EEA national, where the child is under the age of 18 and where a court has ordered that such access must take place in the United Kingdom; or

(iv) the continued right of residence in the United Kingdom of A is warranted by particularly difficult circumstances, such as where A or another family member has been a victim of domestic violence whilst the marriage or civil partnership was subsisting.

(6) The condition in this paragraph is that the person –

(a) is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b) is the family member of a person who falls within paragraph (a).

(7) In this regulation, “educational course” means a course within the scope of Article 10 of Council Regulation (EU) No. 492/2011(12).

(8) A person (“P”) does not satisfy a condition in paragraph (2), (3), (4) or (5) if, at the first time P would otherwise have satisfied the relevant condition, P had a right of permanent residence under regulation 15.

(9) A family member who has retained the right of residence ceases to enjoy that status on acquiring a right of permanent residence under regulation 15”.

10. Article 20 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) is titled “Equality before the law” and states “Everyone is equal before the law”.

11. Article 21(1) of the Charter of Fundamental Rights of the European Union (2000/C 364/01 is entitled “Non-discrimination” and states as follows:

“(1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion, belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

12. Regulation 7(3) of the EEA Regulations states:

“ **Family member**

7. (3) A person (“B”) who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A, provided –

(a) B continues to satisfy the conditions in regulation 8(2), (3), (4) or (5); and

(b) the EEA family permit, registration certificate or residence card remains in force”.

13. Regulations 8(2), (3), (4) and (5) state:

“ **Extended family member**

8. (2) The condition in this paragraph is that the person is –

(a) a relative of an EEA national; and

(b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national’s household; and either –

(i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or

(ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national’s household.

(3) The condition in this paragraph is that the person is a relative of an EEA national and on serious health grounds, strictly requires the personal care of the EEA national.

(4) The condition in this paragraph is that the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national.

(5) The condition in this paragraph is that the person is the partner (other than a civil partner) of, and in a durable relationship with, an EEA national, and is able to prove this to the decision maker".

14. In the first ground, it was submitted that these Regulations if read purposively closed the gap in the legislation that once a registration card had been issued, an extended family member was treated as a "family member" for interpretation of the rest of the legislation. If this interpretation was utilised it protected vulnerable victims of domestic violence who were not married to their EEA partners.

15. In assessing that submission, the judge found at paragraph 23:

"However, I find that the appellant does not satisfy the conditions in Regulation 8(2), (3), (4) or (5). Whilst the continuation of a durable relationship would create a right, there is no such provision for a durable relationship which has ended".

16. It was submitted this was an illogical and unfair reading of Regulation 10. Regulation 10(5)(a) commenced by referring to the family member "ceasing" to be so when certain events happen. The appellant as a "family member" only ceased to be so when he was a victim of domestic violence and the relationship ended. In failing to assess the submission advanced by not construing Regulations 8 and 10 in a purposive manner the First-tier Tribunal had materially erred in law.

17. Such purposive approach could be supported by the fact that the respondent has so far not suggested that she is seeking to limit the rights of unmarried victims of domestic violence. This argument was raised in the grounds of appeal to the First-tier Tribunal at paragraphs 19 and 20.

"19. Article 52 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) states the following:

'1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

20. It is argued that in interpreting the law, the Directive or Regulations in such a manner that fails to acknowledge retained rights of residence for victims of domestic violence who have been in a durable relationship with EEA nationals, whilst making the similar provisions in the Immigration Rules for the unmarried partners of British citizens or settled persons cannot be regarded as genuinely meeting the spirit of Article 52 of the Charter of Fundamental Rights of the European Union. The respondent has not provided any reasons in the decision in view of the above referred principle of proportionality as to whether he is proposing to limit the rights of the unmarried partners of EEA nationals and if so how such limitations, if any, are proportionate particularly when similar rights are afforded to married partners of both EEA and British citizens and also to the unmarried partners of the British citizen/ settled persons/refugees".

18. By failing to address the argument the judge materially erred in law.

19. The second ground advanced was on the basis of discrimination. The submission to the First-tier Tribunal in the skeleton argument read as follows:

“The respondent’s position is that unmarried and married victims of domestic violence are protected under the Immigration Rules provided the perpetrator was British. Married or civil partner victims of domestic violence are protected under the EEA Regulations. But unmarried partner (sic) have no protection if their relationship was with an EEA national. It is submitted not only is this argument illogical, contrary to the spirit of the EEA Regulations and is contrary to previous unreported decisions in the FtT (see Annex A attached). Permission is sought to rely on this unreported case”.

Paragraph 18 of the grounds (as originally submitted against the respondent’s refusal) highlighted that appellants in this position “must” be provided the “same advantage” to migrant workers from other member states.

20. The judge did not address this argument nor the lack of protection for extended family members who are recognised as being in durable relationships with EEA nationals but who become the victims of domestic violence.

21. In the light of the above it was submitted that the judge had erred in law in the interpretation of the Regulations and/or, had not addressed the arguments on discrimination as advanced.

22. At the hearing before me Ms Cunha helpfully provided the explanatory memorandum to the 2016 EEA Regulations which underlined that it was open to the Secretary of State to exercise her own discretion. Mr Davison relied on the written grounds as outlined above, initially stating that Regulation 10(5) did not sit comfortably with Regulation 7. Family members were protected but the appellant only, according to the interpretation, continued to satisfy the conditions in Regulation 8(2), (3), (4) or (5) when experiencing domestic violence but not thereafter.

23. The First-tier Tribunal had not addressed this point; in effect the victim who was unmarried would have to stay in a violent relationship albeit the Regulations were there to protect people. I was referred to the AIRE Report which in turn referred to a First-tier Tribunal unreported decision, given under a different statutory appeal regime, whereby an unmarried partner who experienced domestic violence was successful in his appeal and the matter was referred back to the Secretary of State for a further decision and no more was heard of it.

24. In this case, Mr Davison submitted, the judge had not tackled the issue of purposive reading.

25. Ms Cunha submitted that one could not read something into something that was not there. The judge at paragraph 23 had provided a reason and that was lawful. He could not enter into such an arena and parliament’s intention was important. On the discriminatory point this was not so because the Secretary of State had a right to exercise discretion and to examine the circumstances of an extended family member. The appellant did not continue to satisfy the Regulations as per Regulation 7(3). Ms Cunha referred to freedom of movement.

26. Mr Davison retorted that he did not quite follow the argument of Ms Cunha, it was not a question of protecting the EEA national ’s rights in domestic violence. A married person should she apply for a retained right would be protected. The purpose of the EEA Rules was not to protect the EEA national in this instance.

Analysis

27. I find that the judge failed adequately to address the points made in the grounds of appeal to the First-tier Tribunal in relation to discrimination. Those grounds were clearly laid out to the First-tier Tribunal and can be seen as early as the covering letter to the Secretary of State dated 17 th April 2019 which reads:

“We submit that if our client’s application is treated differently simply because he was in a durable relationship as opposed to a married spouse, his difference of treatment would be a fundamental breach of the EU law principles of equal treatment and proportionality”.

The grounds of appeal to the First-tier Tribunal at paragraph 11 set out:

“The decision (that of the respondent) fails to acknowledge the appellant’s rights on the basis that the Immigration (EEA Area) Regulations 2016 (as amended) has no provisions for an unmarried durable partner of EEA national whose relationship has ended due to the fact that he is a victim of domestic violence. The respondent has failed to engage with the legal argument put to him in the representations sent with the application in this regard and therefore failed to engage with the relevant EU law”.

28. At paragraph 13 onwards the appellant’s grounds to the First-tier Tribunal asserted that the decision breached the fundamental EU law principles of equal treatment and proportionality.

29. Nowhere in the decision did the judge address the points made and detailed in the grounds of appeal to the First-tier Tribunal in relation to discrimination. That is an error of law.

30. Against the context of the EU Directive and the case of **Netherlands v Reed [1987] 2 CMLR 448,** the arguments on discrimination should at least have been addressed. **Netherlands v Reed** held that that a member state which grants such an advantage (permission for his unmarried companion to reside with him) to its own nationals cannot refuse to grant it to workers who are nationals of other member states without being guilty of discrimination on grounds of nationality. At paragraph 30 the following was set out

‘Article 7 of the treaty , in conjunction with article 48 of the treaty and article 7 (2) of regulation no 1612/68 , must be interpreted as meaning that a member state which permits the unmarried companions of its nationals , who are not themselves nationals of that member state, to reside in its territory cannot refuse to grant the same advantage to migrant workers who are nationals of other member states’.

31. In **Martinez Sala (Free movement of persons)** [1998] EUECJ C-85/96 the principle of equal treatment precluded the member state from requiring a national of another member state to be in possession of a residence permit in order to be granted a social advantage where no such requirement was imposed on its own nationals; the concept of social advantage should not be narrowly drawn. It has been acknowledged that the comparison between the positions of own nationals and those of others is not precise.

32. Exceptions to the principle of non-discrimination have been acknowledged by the courts on the basis of objective discrimination because certain requirements are necessary for non-nationals or non-residents which would not apply to own nationals. In **Kaba** C-356/98 [2007] All ER (EC) 537, ECJ the difference was that own nationals could not acquire indefinite leave.

33. By contrast, although Ms Cunha referred to the ‘discretion’ of the Secretary of State in this instance, it is possible to fulfil the requirements under the Immigration Rules at paragraph 289A as an

unmarried partner (a ‘foreign-national’ who is the victim of domestic violence) without the requirement of any exercise of discretion by the Secretary of State. That raises the spectre of discriminatory treatment of nationals from other member states compared with the United Kingdom’s ‘own nationals’ under the Immigration Rules.

34. As I pointed out to Mr Davison his reference to the Charter of Fundamental Rights was no longer applicable as the European Union (Withdrawal) Act 2018 makes clear at Section 5 that the Charter of Fundamental Rights is no longer part of domestic law on or after exit day.

35. Nonetheless, in the light of the above I consider that the that the analysis by the First-tier Tribunal was either inadequate or entirely omitted and that a was a material error.

36. The two grounds before me are somewhat intertwined and I direct that argument may be made in respect of both grounds albeit that the first ground on purposive reading is not perhaps so strong.

37. The matter should be properly analysed with full submissions on legal arguments supported by relevant case law. I preserve the findings from paragraphs 16 to 19 of the First-tier Tribunal.

38. On that basis the decision is set aside, and the matter will be relisted in the Upper Tribunal for a resumed hearing.

Signed Helen Rimington Date 12 th August 2020

Upper Tribunal Judge Rimington

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[1] As amended by the European Union (Withdrawal Agreement) Act 2020 Sch.5(2) para.12(d)(ii)